U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue Date: 08 August 2006

BALCA Case No.: 2005-INA-129
ETA Case No.: P2002-CA-09535581

In the Matter of:

JEWELRY CONNECTIONS,
Employer,

on behalf of

HOVHANNES ARTUNYAN,
Alien.

Certifying Officer: Martin Rios
San Francisco, California

Appearance: Jack Golan, Esquire
Los Angeles, California
For the Employer and the Alien

Before: **Burke, Chapman, and Vittone**
Administrative Law Judges

DECISION AND ORDER

PER CURIAM. This case arises from an Employer's request for review of the denial by a U.S. Department of Labor Certifying Officer ("CO") of its application for labor certification. Permanent alien labor certification is governed by section 212(a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. §1182(a)(5)(A), and Title 20, Part 656 of the Code of Federal Regulations ("C.F.R.").[1] We base our decision on the record upon which the CO denied

[1] This application was filed prior to the effective date of the "PERM" regulations. *See* 69 Fed. Reg. 77326 (Dec. 27, 2004). Accordingly, the regulatory citations in this decision are to the 2004 edition of the Code of Federal

certification and the Employer's request for review, as contained in the appeal file ("AF"), and any written arguments. 20 C.F.R. §656.27(c).

STATEMENT OF THE CASE

On April 17, 2001, the Employer, Jewelry Connections, filed an application for labor certification to enable the Alien, Hovhannes Artunyan, to fill the position of "MODEL MAKER, Jewelry-Silver," which was classified by the Job Service as "Jeweler & Metal Worker" (AF 93). The job duties were set forth on the application as:

> Constructs metal models of jewelry articles for use in making molds for casting jewelry parts: Lays out design on metal stock, using gravers. Cuts metal along markings and smoothes edges, using handsaw and file. Examines and measures metal parts for conformance to design specifications on scale drawing. Hammers, carves, and scrapes rough model to produce specified relief design, using handtools. Drills holes in model, using drill press. Assembles and solders parts together. Polishes metal surfaces, using abrasive wheel. May make and sharpen tools. Modify design specifications to conform to production requirements. Construct preliminary model of wax or wire.

(AF 93, Item 13). The Employer required two years of experience in the job offered (AF 93, Item 14). On October 9, 2001, the Employer requested that the application be converted from regular to "RIR" (*i.e.,* reduction in recruitment) processing (AF 100-101). On August 26, 2003, the CO found that the Employer's RIR request could not be approved, and remanded the case to the Job Service for supervised recruitment (AF 80).

Following the completion of supervised recruitment, the CO issued a Notice of Findings ("NOF") in which he proposed to deny certification on the ground, *inter alia,* that the Employer had not established that the job opportunity is clearly open to qualified U.S. workers, as provided in §656.20(c)(8) (AF 87-90). The Employer submitted its rebuttal thereto on or about October 6, 2004 (AF 18-86). However, in the Final Determination, dated October 18, 2004, the CO found the rebuttal unpersuasive and denied certification (AF 15-17). On November 11, 2004, the

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Regulations published by the Government Printing Office on behalf of the Office of the Federal Register, National Archives and Record Administration, 20 C.F.R. Part 656 (Revised as of Apr. 1, 2004), unless otherwise noted.

Employer requested a review of the denial (AF 1-14). Subsequently, this matter was forwarded to the Board of Alien Labor Certification Appeals. On May 24, 2005, we issued a Notice of Docketing and Order Requiring Statement of Position or Legal Brief. Pursuant thereto, counsel filed an "Appeal Brief for Employer and Alien," together with supporting documentation.

DISCUSSION

In the NOF, the CO stated, in pertinent part:

> There is question whether a current job opening exists to which U.S. workers can be referred. In seeking labor certification, the employer must offer a job that is truly open to U.S. workers. 20 CFR 656.20(c)(8).
>
> According to 20 CFR 656.3, the term "Employer" means a person, association, firm, or a corporation which currently has a location within the United States to which U.S. workers may be referred for employment and which proposes to employ a full-time worker at a place within the United States.
>
> Also, 20 CFR 656.20(c)(4) indicates the employer must be able to place the alien on the payroll on or before the date of the alien's proposed entrance into the United States.
>
> Question has arisen because the employer states that the business is a family business with no employees yet, and although the application for labor certification has been pending for several years there are still no employees. If the alien is a family member or nonemployee associate of the business, there is question as to whether the job offer is being created for the labor certification or whether the job is truly open to U.S. workers as required.

(AF 88).

To address the above-stated deficiency, the CO directed the Employer to provide documentation regarding the legal status of the company, and to show the relationship between the Alien and all owners, officers and partners. Furthermore, the CO stated:

> However, relationship or ownership are not the only factors that may be reviewed when the question of whether the job is truly open to U.S. workers. In this instance, the alien is in the United States with a vias [sic] that allows employment,

> is stated to be unemployed, and is being offered a position at a company that has not [sic] employees. There is a question whether the alien is already working for the employer as an employee or in other than employee status, if so, when the alien began to work, and whether the employer be [sic] truly willing and able to replace him with a U.S. worker requiring employee wages.
>
> Next, where there are no employees, the employer should also provide evidence of ongoing business income sufficient to pay the offered salary to the alien for a full-time position as described. This should include the employer's most recent tax return showing the business income. 20 CFR 656.20(c))4).
>
> All information submitted may be reviewed in considering whether the job opportunity is truly open to U.S. workers.

(AF 88-89).

The rebuttal consisted of a cover letter by the Employer's counsel, dated October 6, 2004 (AF 18), a list of supporting documentation (AF 19), copies of the Employer's Articles of Incorporation (AF 20-21), Statement of Information Domestic Stock Corporation (AF 22), Fictitious Name Statement (AF 23-24), Employer's Federal tax returns for 2003 (AF 26-32), the Dictionary of Occupational Titles (D.O.T.) and O*Net Online Crosswalk Search Results for Model Maker II and Jewelers (AF 33-37), various documents regarding the Employer's recruitment effort (AF 38-79), and an explanatory letter by the Employer's President/Owner (AF 81-85).

In the Final Determination, the CO denied certification, stating in pertinent part:

> In reviewing the information submitted, we find that the employer has not been responsive to all of the questions raised in the Notice of Findings. First, employer has completely failed to state whether or not the alien is working for the business. The employer's statement concerning an alleged general rule about business visitors with B-1 visas is not responsive to the specific question about the situation at hand with the alien beneficiary and this application.
>
> The tax return shows no compensation for officers (Form 1120, line 7) and no wages paid to employees (Form 1120, line 8). Thus it appears that the amount of $46,144 is the company's total income after deducting the cost of goods and expenses. Thus if an employee were hired for the labor certification job, the employer would have to pay about half of the company's entire income in wages:

> The offered salary of $11.45 per hour is about $23,816 per year. [11.45 x forty hours per week=about $458 per week x 52 weeks=about $23,816 per year]. It is not convincing that such a small employer would offer half the company's income for a model maker when his total income is only $46,144 per year [46,144 minus 23,816 = 22,328].
>
> In reviewing all information provided, we find that the employer has not overcome the appearance that the job is not truly open to U.S. workers. The employer is proposing to create a new employee position in a small company that has no employees. The alien is the employer's cousin. The employer has not been forthcoming about whether the alien has started working in any capacity. The employer's statement that the company can afford the salary shows only that the income of the company is greater that [sic] the salary offered. However, with no compensation for officers, the company income even without paying a full-time employee does not [sic] a high income for the employer in the Los Angeles, California, geographic area. A reduction of the employer's income from $46,144 by the cost of the salary for the labor certification position over a full-time year would be so significant relative to the total income so as to make it less likely that the company could hire such an employee.
>
> We can only weigh the information that the employer has provided. In doing so, we find that the employer has failed to overcome the finding that the job does not appear to be open to U.S. workers as required. Therefore, the application is denied.

(AF 16-17).

In the Request for Review (AF 1-2) and the Appeal Brief, the Employer stated, in pertinent part, that the CO misinterpreted the law and misconstrued the documentation presented in rebuttal (Appeal Brief, pp. 4-16). We disagree.

In the NOF, the CO clearly stated:

> There is a question as to whether the alien is already working for the employer as an employee *or in other than employee status*, if so, when the alien began to work, and whether the employer [would] be truly willing and able to replace him with a U.S. worker requiring employee wages.

(AF 88-89) (emphasis added).

In response thereto, the Employer stated: "The alien is in the United States with a B-1 visa, which is a visa for Business Visitors. The B-1 visa holder, however, as a general rule, cannot engage in productive employment in the U.S." (AF 82). However, as found by the CO, the mere fact that business visitors who hold B-1 visas should not engage in certain types of employment or labor for hire begs the CO's specific question as to whether or not Mr. Artunyan is already performing work for the Employer. Furthermore, the fact that the Employer's tax returns and other evidence indicate that it has no employees is also not responsive to the CO's question as to whether Mr. Artunyan is working for the Employer in "other than employee status."

The Board has consistently held that a petitioning employer must provide directly relevant and reasonably obtainable documentation requested by a CO. *See, e.g., Gencorp*, 1987-INA-659 (Jan. 13, 1988)(en banc); *Kogan & Moore Architects, Inc.*, 1990-INA-466 (May 10, 1991); *Bob's Chevron*, 1993-INA-498 (May 31, 1994). As stated above, the Employer failed to provide such information regarding the Alien's working relationship, if any, with the Employer.

Finally, it is well settled that an employer has the burden of showing that a bona fide, permanent, full-time job opportunity exists which is clearly open to U.S. workers. Although the Alien apparently has no ownership interest in the Employer's business, the record establishes that he is a cousin of the Employer's owner (AF 81-82). Furthermore, although the application for labor certification was filed on April 17, 2001 (AF 93), the Employer still had no employees or other compensated officers as of 2003 (AF 26). Moreover, although the Employer had sufficient income to pay the stated wage rate, if the Employer were to hire a full-time employee, it would reduce its total income by more than 50%. Accordingly, as found by the CO, the Employer has failed to meet its burden of showing that the job opportunity is a bona fide position open to U.S. workers.

In view of the foregoing, we find that labor certification was properly denied.

ORDER

The Certifying Officer's denial of labor certification is hereby **AFFIRMED**.

Entered at the direction of the Panel by:

A

Todd R. Smyth
Secretary to the Board of
Alien Labor Certification Appeals

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary unless within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W., Suite 400
Washington, D.C. 20001-8002

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced typewritten pages. Responses, if any, shall be filed within ten days of the service of the petition, and shall not exceed five double-spaced typewritten pages. Upon the granting of the petition the Board may order briefs.